IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 527 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RATANLAL GULABCHAND GUPTA

Versus

SAHARA SEV GRUH UDYOG BHANDAR

Appearance:

MR ASHOK K PADIA for Petitioner

MR IQBAL M MALIK for Respondent No. 1 - Absent

RULE SERVED for Respondent No. 2

MR SAMIR DAVE, ADDL. PUBLIC PROSECUTOR for Respondent No. 3

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 20/02/2001

ORAL JUDGEMENT

The challenge has been made by the petitioner original complainant in the Criminal Case No. 277/95

under Section 138 of The Negotiable Instruments Act, to the orders passed by the learned Metropolitan Magistrate, Court No.10, Ahmedabad and of the learned Additional City Sessions Judge, Court No.19, Ahmedabad in the matter of restoration of the case aforestated dismissed for non-prosecution. This criminal case was registered on the private complaint filed by the petitioner.

The facts of the case are that the respondents Nos. 1 and 2 used to purchase "Mendo" from the petitioner. The last purchase of Mendo on credit worth Rs. 1,21,687/- was made by the respondents Nos. 1 and 2 against bills of various dates. Towards the payment of the amount aforesaid, the respondent No.2 issued cheques, the details of which are given in paragraph No.3 of this Special Criminal Application. On presentation of these cheques by the petitioner with his bankers - The Kalupur Commercial Co-operative Bank, Chowka Bazaar, Ahmedabad for encashment thereof, the same were return by his bankers with endorsement "insufficient balance" and "exceeds arrangement". On 29th December, 1994, the petitioner issued a legal notice to the respondent Nos. 1 and 2 through his Advocate. The respondents Nos. 1 and 2 did not make the payment of the amount of the dishonoured cheques and the petitioner in these facts left with no option but to file the criminal complaint, which was registered as Criminal Case No. 277 of 1995, in the Court of Metropolitan Magistrate, Court No.10 at Ahmedabad.

The summons of the complaint were duly served upon the respondents Nos. 1 and 2 and they put their appearance in the complaint.

It is submitted that this criminal case was on the Board of the Court on 24th October, 1996 and the next date was given 24.12.1996, but on that date when the petitioner went to the Court to attend the matter, it was not on the Board of the Court. The petitioner's Advocate told to the petitioner that he may go and the date fixed in the matter would be intimated to him. As the intimation was not sent by his Advocate of the date fixed in the matter, the petitioner went to the Court and enquired about the matter. On 9th March, 1997, the petitioner found that the other side had made a false application before the Court that the petitioner was not remaining present and therefore, the complaint should be dismissed for default. The learned trial Court dismissed the complaint and acquitted the accused, the respondents Nos. 1 and 2.

Against this order of the learned trial Court, the petitioner preferred Criminal Revision Application No. 66 of 1998, which came to be decided by the Additional City Sessions Judge, at Ahmedabad by his order dated 11.2.1999. The Criminal Revision Application is dismissed and hence this petition.

2. The learned Counsel for the petitioner contended that the Courts below have taken the matter very casually and the substance of the matter has not been considered. Referring to Section 256 of the Criminal Procedure Code, 1973, the learned Counsel for the petitioner submitted that the Courts below have not considered this provision of the Code, which provides that where the complainant is represented by a pleader and where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. In this case the complainant was represented by the Advocate. On 24th October, 1996, the petitioner was present, but on this date the matter was adjourned to 24.12.1996. On 24.12.1996 the petitioner went to the Court, but his matter was not on the Board and his Advocate told him not to stay for the date and further told that he would inform him the next date as soon as the matter is listed for hearing. In these facts what the learned Counsel for the petitioner urged is that the petitioner was bonafide prosecuting the criminal complaint. Concluding the submission, learned Counsel for the petitioner submitted that under Section 256 of the Code of Criminal Procedure Code, 1973, it is not only an option available to the Magistrate to dismiss the complaint and acquit the accused in a case where the complainant is not present.

3. I have given a thoughtful consideration to the submissions made by the learned Counsel for the petitioner.

Section 138 of The Negotiable Instruments Act is inserted in the Act aforesaid and on a mere perusal thereof it is clear that civil liability of a person is converted into a criminal offence. This has been inserted by the Parliament with the object and purpose of holding a person criminally responsible for his acts, in the commercial transactions, trade and business dealings with the peoples carried out negligently, carelessly or without sense of responsibility. It is not unknown to the peoples that dishonoured cheque of a party in the business dealings results in the reputation of the banking system and faith therein of their. Prior to enactment of this Act by the Parliament by insertion of

Section 138 in the Negotiable Instruments Act, nobody bothered or cared for a dishonoured cheque. That is how the cheque of a Bank was not that of force and effect. Section 138 of the Negotiable Instruments Act has created a faith, confidence and satisfaction in the banking system of the peoples. In the case of dishonour of cheque if the drawer thereof on the receipt of the notice from the drawee not paid the amount of the cheque within a stipulated period, his this act constitutes an offence punishable under Section 138 of the Negotiable Instruments Act. The complainant in the criminal complaint under Section 138 of the Negotiable Instruments Act filed by him needs to prove the offence but to prove thereof, much quantum of evidence both oral or documentary is not required. Even the complaints filed under Section 138 of the Negotiable Instruments Act have their own long life that is different matter. In our this adversary system in the country there is nothing wrong of dependent of a litigant who have chosen to engage an Advocate in the matter on him. In the case of this nature, on every date is fixed or the proceedings are taken up, the complainant's presence is not necessary and more so where he has engaged an Advocate. It is unfortunate that the Advocate was not sufficiently vigilant in conducting the matter. But for this act of the Advocate why the poor complainant should suffer. On 24.10.1996, the petitioner was present in the Court and 24.12.1996 was the next date fixed therein. On that date the matter was not on the Board. The best course available in these facts to the petitioner was to contact his Advocate and I do not find any perversity in the approach of the litigant to act in accordance with the advice of the Counsel. I fail to see why the case of the petitioner has not been accepted by both the Courts below. A complainant, on his absent, may face consequences of the dismissal of the complaint as well as discharge of the accused. How absence of the complainant in the criminal case is beneficial to him. The absence of the complainant in the matter results in dismissal of his complaint, he has to take all the precautions and in this case petitioner did and he engaged an advocate. On 24.12.1996 the next date was not fixed in case could not be known by the petitioner and I do not find any abnormality in the approach of the petitioner to rely upon the advice of his Advocate. The Advocate has told him to inform him the next date fixed in the matter. It is a different matter that the Advocate has not informed the petitioner the next date fixed in the matter. Though Advocate is supposed to take all the care in the matter of his client, but for his action, omission or lapse ultimately the poor litigant has to pay heavily. It is

not the case of the respondents that the complainant petitioner has not engaged an advocate in the case. He had engaged the advocate to avoid any adverse order in the complaint for his absence and to defend his case. It is unfortunate that the advocate did not remain present and for this act he has paid heavily. By keeping himself absent in the proceedings the complainant is not benefited. The trial Court as well as the Revisional Court has not considered this aspect of the matter. They proceeded with totally a technical approach despite the fact that in series of decisions this Court this their approach is not appreciated. Even for the time being it is accepted that the complainant was not present, how far it is justified on the part of the trial Court to dismiss the complaint where he engaged an advocate to represent him. It is the case where trial Court has punished the petitioner for the inaction or omission of the advocate. The learned Court below should not have given any premium to the accused for his benefit on the ground of the absence of the advocate. In the facts of this case the orders passed by both the Courts below cannot be allowed to stand. A time comes where the trial Court as well as the Sessions Court are to look into the matter with justice oriented approach. It is to be stated that this is not a matter pertaining to poor or down-trodden peoples, but it relates to the peoples of business class who has, though issued cheques but avoided to make payments by honouring the cheques presented for encashment. How the Court subordinate to deal with and decide the application of a complainant who's complaint is dismissed for prosecution, the reference may have to in two decisions of this Court. In the case of State Vs. Keshavram - 1977 LLR 524, this Court held:

> "The power under Sec. 256 of the Criminal Procedure Code has been conferred on the Magistrate obviously for the ends of justice and with a view to see that an accused person is not subjected to any undue harassment. The proviso to Sec. 256 further lays down that when the complainant is represented by a Pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. In the instant case, the situation on the day in question squarely fall within the proviso and still the learned Magistrate has acted under the main part of this section. This is really unfortunate and it is hoped that repetion of such instances would not be there in future in the

Court of the Magistrate."

In case of Sureshchandra Chandulal Patni Vs. Natwarlal Keshavlal Patni - 1992 (1) GLR 626, this Court held:-

"In the instant case, the learned Magistrate has not recorded any reason about his thinking it proper to adjourn the hearing of the case to some other date. It appears that he has ignored the proviso to Sec. 256 of the Code of Criminal Procedure. The power under Sec. 256 of the Code of Criminal Procedure has been conferred on the Magistrate obviously in the interest of justice, with a view to seeing that the accused is not subjected to any undue harassment. It is clear from the proviso to Sec. 256 of the Code of Criminal Procedure that when the complainant is represented by a pleader or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with the personal attendance of the complainant and proceed with the case. In the instant case, the learned Magistrate does not appear to have applied his mind in dispensing with the personal attendance of the complainant and to proceed with the case or to adjourn the case to some other date as requested in the application submitted by the Advocate for the complainant. In the present case, the situation as on March 5, 1984 squarely falls within the aforesaid proviso and still the learned Magistrate acted under sub-sec. (1) of Sec. 256 of the Code of Criminal Procedure acquitting the accused. It is therefore, clear that the learned Magistrate has ignored the provision contained in the proviso to Sec. 256 of the Code of Criminal Procedure."

In such matters the approach of the Courts should have been pragmatic and not pentantic. If the matters are decided by use of the power to dismiss the matter for default, it does not give a good name to the institution. Where the litigants approach the Court for redressal of grievances, the cases are to be decided on merits with a judicial approach rather than the Courts exercising power to dismiss the matter for default. This is exactly what both the Courts below have done in the present case. From the facts of this case it appears that on 24th October, 1996, the matter was adjourned to 5th Nov., 1996

and of this date the petitioner would not have any notice. Under Article 227 of the Constitution of India, though the power of judicial review vests in this Court is very very restricted one, but in a case where the non-interference of this Court in the matter may result in miscarriage of justice, certainly its interference may be ncessary and to do the complete justice this discretion has to be exercised in favour of the person who is the victim of miscarriage of justice. The revisional Court has not undertaken any exercise in the matter except as if it was there to confirm the order of the learned Court below. This Court in many decisions has given out the guidelines to the Magistrates in the matter of dismissal of complaint and acquittal of the accused for absence of the complainant. The learned Additional Sessions Judge of the City Civil Court has not considered the decisions of this Court which are binding on him. The learned Counsel for the petitioner even if not cited any authority before the revisional Court, it is expected from the Court to look into the matter and to know what the law laid down by this Court. It is not the law that in all the matter this Court may not exercise its power of the judicial review under Article 227 of the Constitution. The Courts below should have made all endeavour to see that as far as possible the matters are decided on merits. It is also expected of the Courts below to read the law laid down by this Court and to decide the matters accordingly. Here in this case both the Courts have not considered the matter in the light of the decisions given by this Court interpreting and giving out the guidelines for them how to deal with the matters when the complainant is not present in the proceeding. The orders of the Courts below are not legally sustainable.

In the result this Special Criminal Application succeeds and the same is allowed and the order of the Metropolitan Magistrate Court No.10 dated 5.11.1996 in Criminal Case No. 277 of 1995 and order of the Additional City Sessions Judge, Court No.19 dated 11.2.1999 in Criminal Revision Application No. 66/98 are quashed and set aside and the complaint of the petitioner is restored to its original number. The learned trial Court is directed to decide the matter on merits. Rule is made absolute. As none is present for the accused respondents, no order as to costs in their favour. In this case the State of Gujarat has unnecessarily been impleaded as a party by the petitioner. In the complaint under Section 138 of the Negotiable Instruments Act, the State is neither necessary nor proper party in the matter and impleading of State as a party in the proceedings is

wholly unjustified, unnecessary and unwarranted. The petitioner therefore is directed to pay cost of this petition to State of Gujarat.

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